88-1636
No. _____

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,

Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; and OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH*
Deputy Attorney General

JOHN P. SARCONE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351

Attorneys for State of Iowa and Iowa Department of Natural Resources

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether Title 25, U.S. Code § 194, if applied in this case to disadvantage the State, would create an unreasonable presumption that the Missouri River moved by avulsion based on the status of the plaintiff as an Indian and thereby violate rights of the State protected by the Due Process Clause, the Just Compensation Clause, and the Equal Footing Doctrine.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below are: The United States of America and the Omaha Indian Tribe, who were the plaintiffs, and the State of Iowa and the Iowa Department of Natural Resources, successor agency to the State Conservation Commission of the State of Iowa, who are the Cross-Petitioners herein. Filing a separate cross-petition are defendants John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson. Other defendants in the proceedings below are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, and Travelers Insurance Company.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Opinions Below 2

Jurisdiction 3

Constitutional and Statutory Provisions Involved ... 3

Statement of the Case 4

Reasons for Granting the Writ 11

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES

Block v. North Dakota, 461 U.S. 273 (1983) 14

City of Richmond v. Croson, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) 12

In Re: Omaha Indian Tribe, No. 86-1717 (8th Cir. July 18, 1986) 3

Loving v. Virginia, 388 U.S. 1 (1967) 12

Morton v. Mancari, 417 U.S. 535 (1974) 11, 12, 16

Mullins Coal Co. v. Director, Office of Workers Compensation Programs, 484 U.S. 135 (1987) 13

Nebraska v. Iowa, 143 U.S. 359 (1892) 13

New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836) 13

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 14

Omaha Indian Tribe v. Jackson, 854 F.2d 1089 (8th Cir. 1988) 3, 7, 16

Omaha Indian Tribe v. Wilson, 575 F.2d 620 (8th Cir. 1978) 2, 16

Omaha Indian Tribe v. Wilson, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) . 2, 6, 7, 15

United States v. Wilson, 433 F.Supp. 57 (N.D. Iowa 1977) 2

United States v. Wilson, 433 F.Supp. 67 (N.D. Iowa 1977) 2, 5

United States v. Wilson, 523 F.Supp. 874 (N.D. Iowa 1981) 2, 7

United States v. Wilson, 707 F.2d 304 (8th Cir. 1982), *cert. denied* 465 U.S. 1025 (1984) 2, 6, 7, 14

TABLE OF AUTHORITIES–Continued

Page

United States v. Wilson, 578 F.Supp. 1191 (N.D. Iowa 1984) 3, 7, 8

University of California Regents v. Bakke, 438 U.S. 265 (1978) 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 13

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 2, 5, 6, 9, 12, 13, 14, 15, 16

STATUTES AND RULES

Act of May 6, 1822, 3 Stat. 683 12

Act of June 30, 1834, C.161, § 22, 4 Stat. 733 ..... 3, 12

25 U.S.C. § 177 12

25 U.S.C. § 194 ..... *passim*

28 U.S.C. § 1254(1) 3

Rule 19.5 of the Rules of the Supreme Court of the United States 3

OTHER AUTHORITIES

United States Constitution, Amendment V 4

No. _____

In The

Supreme Court of the United States

October Term, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,

Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; and OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The State of Iowa and the Iowa Department of Natural Resources, successor to the Iowa Conservation Commission, who are respondents as to the Petition of the Omaha Indian Tribe in No. 88-1426, cross-petition for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Eighth Circuit in this case if this Court grants the Tribe's petition.

OPINIONS BELOW

There are nine reported opinions in this litigation, an unreported order of the Court of Appeals, and the District Court's unreported Final Judgment and Decree dated May 29, 1987 (Pet. App. p. 16a), which was amended by Order dated June 30, 1987 (Pet. App. p. 31a).

The opinions and orders, in chronological order, are as follows: *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977) [*Blackbird Bend I*[1]] (Pet. App. p. 189a); *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977) [*Blackbird Bend I*] (Pet. App. p. 205a); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) [*Omaha I*] (Pet. App. p. 135a); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) [*Omaha II*] (Add. p. A-1); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981) [*Blackbird Bend II*] (Pet. App. p. 52a); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert.*

---

[1] For convenient reference, the Court of Appeals and the parties have referred to the four decisions of the Court of Appeals as *Omaha I, II, III,* and *IV*. The three decisions of the trial court have been referred to as *Blackbird Bend I, II,* and *III*. *Blackbird Bend I* includes the memorandum opinion of the District Court reported at 433 F.Supp. 57, and its findings of fact and conclusions of law reported at 433 F.Supp. 67.

denied 465 U.S. 1025 (1984) [*Omaha III*] (Pet. App. p. 92a); *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) [*Blackbird Bend III*] (Pet. App. p. 5a); *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) [*Omaha IV*] (Pet. App. p. 37a); *In Re: Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (Pet. App. p. 461a); Final Judgment and Decree entered May 29, 1987 (Pet. App. p. 16a); Order entered June 30, 1987 (Pet. App. p. 31a).

JURISDICTION

On February 28, 1989, the Omaha Indian Tribe filed a timely Petition for Writ of Certiorari in No. 88-1426 asking for review of the judgment of the Court of Appeals entered on August 12, 1988. The Tribe invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The Cross-Petitioners received the Petition on March 3, 1989. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25 Section 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

Act of June 30, 1834, C.161, § 22, 4 Stat. 733.

United States Constitution, Amendment V.

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves title to land on the Iowa side of the Missouri River in Blackbird Bend. The Omaha Indian Tribe claims the land was cut away from its Nebraska reservation by a series of avulsions occurring after 1867 and before 1923. According to the Tribe's own complaint in 1975, the land had been occupied by the State and by Iowa landowners for approximately forty years. (Pet. App. p. 210a).

The Omaha Indian Tribe ceded all lands east of the Missouri River by Treaty in 1854. The Omaha Indian reservation is located on the west bank of the Missouri River in Nebraska.

In 1975 the Omaha Indian Tribe and the United States brought separate suits claiming Iowa land allegedly cut off from the Omaha Indian reservation by a series of avulsions after 1867 and before 1923. (Pet. App. pp. 263a, 269a).

While the United States claimed only the "trust lands" which were in the reservation in the 1867 Barrett Survey, the Tribe claimed an additional 3490 acres which allegedly accreted to the reservation prior to the river's "jumps" west. The Tribe's theory was that the river always moved away from the reservation by accretion,

thus adding land, and always moved back by avulsions, leaving the area in tribal ownership.

In 1976 claims to the lands in Blackbird Bend within the original reservation (the Barrett Survey area) were ordered to be first tried. (Pet. App. pp. 208a, 405a). The second part of the litigation involves the Tribe's additional land claims in this and other bends of the river. (Pet. p. 17, n.53) (Pet. App. pp. 48a, n.6, 208a). Some parties claiming land in the area outside the Barrett Survey were not parties to the portion tried below. (Pet. App. p. 48a, n.6). The Tribe did not appeal the April 1976 severance order, and the second portion of the suit has not yet been tried. However, the Tribe now insists that title should be quieted in it to all of the land within the entire bend.

The Barrett Survey portion was tried in 1976, and the District Court found that the Tribe failed to prove the alleged avulsions and that the river instead always moved by accretion. That decision, referred to here as *Blackbird Bend I* (Pet. App. pp. 205a, 242a-243a), was the first of nine written opinions in this case. The District Court and the Court of Appeals have written four decisions, and this Court has written one, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a). Final judgment has now been entered in the first portion. (Pet. App. pp. 16a-36a).

The final judgment resolves ownership of three categories of land within the Barrett Survey as follows:

(1) **Trust lands** – The United States as trustee for the Tribe obtained title to 1900 acres of "trust lands" which had been in the possession of private defendants for

many years. This area was in the reservation in the 1867 Barrett Survey. In *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 123a, 132a), this Court held that 25 U.S.C. § 194 imposed the burden of proof on the private defendants to establish ownership of the area which was in the reservation prior to the river movements. "Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." (Pet. App. p. 123a).

On remand, the Court of Appeals held that the private defendants failed to overcome the presumption of title created by 25 U.S.C. § 194. *Omaha II* (Add. p. A-17). The Court of Appeals concluded that section 194 precluded the defendants from relying on any inferences from weaknesses in the Tribe's evidence, such as the lack of proof of any identifiable land in place after the alleged avulsions. (Add. pp. A-6, A-13, A-17). Although recognizing that the Tribe's evidence "did not equally balance Defendants' proof . . . " (Add. p. A-17), the Court held that the Tribe prevailed because of 25 U.S.C. § 194. This Court denied the Defendants' petitions for a writ of certiorari on October 6, 1980.

(2) **State lands** – The State of Iowa prevailed as to the 672.93 acres claimed by it within the Barrett Survey. In *Wilson*, this Court held that section 194 could not be applied to the State of Iowa, which is not a "white person." (Pet. App. pp. 121a-122a, 132a). The Tribe was therefore required to prove its case against the State without benefit of section 194. *Omaha III* (Pet. App. pp. 96a-100a).

In the most recent decisions below, the District Court determined again, as it did after trial, that the Tribe had failed to meet its burden of proof that the river moved by avulsion and the State was entitled to the lands it claimed. *Blackbird Bend III* (Pet. App. pp. 11a-12a). The Court of Appeals affirmed. *Omaha IV* (Pet. App. pp. 41a-44a).

The Tribe's argument that *Omaha II* conclusively established its right to the State lands as accretions to the "trust lands" had been adopted by the District Court on remand from *Omaha II*. *Blackbird Bend II* (Pet. App. pp. 56a-57a, 83a-84a). The State appealed, and the Court of Appeals held that this decision misconstrued the mandate in *Omaha II* and erroneously "bootstrapped" the Tribe's victory under section 194 so as to apply it improperly against the State. *Omaha III* (Pet. App. pp. 99a-100a). The Court of Appeals pointed out that its decision in *Omaha II* held only that the private defendants failed to overcome the presumption of title created by section 194 and did not determine that the Tribe proved the alleged avulsions. (Pet. App. p. 101a). On remand from *Omaha III*, the District Court held that the Tribe had not met its burden of proof that the river moved by avulsion. *Blackbird Bend III* (Pet. App. pp. 11a-12a). It is that decision which resulted in the final judgment challenged by the Tribe.

(3) **Fee patent lands** – The United States had issued fee patents to individuals to certain lands within the Barrett Survey line prior to the river movements. (Pet. App. pp. 188a, n.70, 209a). Section 194 did not therefore apply to the fee patent lands. *Omaha III* (Pet. App. pp. 100a-103a). Thus, like the State lands, the Tribe was

required to prove the alleged avulsions on which its claim of title depended. (Pet. App. pp. 100a-103a). There are approximately 306 acres of fee patent lands to which title was quieted in private defendants. (Much of the State lands had also been conveyed out of trust by fee patent.)

The United States had excepted from its complaint all lands which had been conveyed by fee patent out of trust. The Tribe, in 1976 (Pet. App. p. 407a), and then not again until November 1985, alleged that the United States' refusal to claim the fee patent lands and any land outside the reservation boundary constituted "fraudulent representation." (Pet. App. p. 321a). The Tribe, however, filed its own suit and put on its own case. Trial is pending on its additional claims. The Tribe did not raise the fraud issue in the prior appeals or on remand until after Judge Bogue issued the decision on ownership in *Blackbird Bend III*. The courts below rejected the fraud claim as meritless and untimely. (Pet. App. pp. 40a, n.4, 363a-365a).

The Tribe and the United States, as trustee for the Tribe, have recovered 1900 acres of the 2900 acres within the Barrett Survey in Blackbird Bend. The plaintiffs prevailed only where 25 U.S.C. § 194 shifted the burden of proof to the private defendants to establish that the alleged avulsions from 1867 to 1923 did not occur. This presumption was so stringent that the private defendants could not rely on any inferences resulting from weaknesses in the plaintiffs' proof of avulsion – even such a major weakness as the lack of evidence of identifiable land left in place. (Add. pp. A-6, A-13, A-17).

The Tribe lost wherever it could not rely on section 194 and it was required to prove the alleged avulsions.

Final judgment was rendered in the first portion of this suit on May 29, 1987. (Pet. App. p. 16a). The Court of Appeals affirmed the portions establishing ownership within the Barrett Survey. The Court of Appeals reversed on the United States' cross-appeal involving use of the court registry fund to pay for improvements. (Pet. App. pp. 44a-45a). That issue does not involve the State. (Pet. App. p. 45a).

The Omaha Indian Tribe filed a Petition for Writ of Certiorari seeking review of that judgment. The State of Iowa received the Petition on March 3, 1989.

SUMMARY OF ARGUMENT

This Court should deny the Tribe's Petition for a Writ of Certiorari which asks this Court to review rulings below which correctly decided issues of fact. The decision that the Tribe failed to meet its burden of proof to establish that the Missouri River jumped west by avulsions is not clearly erroneous, and no need exists for this Court to review the issues in this case.

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), held that 25 U.S.C. § 194 does not shift the burden of persuasion to the State, because it is not a "white person." The Tribe's petition asks this Court to effectively overrule that decision and permit the Tribe to prevail against the State without proof of the alleged avulsions. Should this Court grant the writ requested by the Tribe, the State should be permitted to present its argument that 25 U.S.C. § 194 cannot constitutionally affect the Tribe's case against the State.

Section 194 was used against private defendants in this case to establish a presumption that the Missouri River moved by avulsion. Yet case law recognizes that avulsion is a very uncommon case. The basis for this presumption is the fact that the area in question was once in the possession or ownership of an Indian. There is clearly no rational connection between a party's status as an Indian and the conclusion that the river moved by avulsion.

Section 194 was first adopted in 1822 as an amendment to the acts regarding trade with Indians. The section makes sense only when viewed in the context of laws prohibiting the sale or transfer of Indian lands except with appropriate federal approval. Congress could perhaps rationally impose on non-Indians the burden of proving the requisite federal approval rather than require the Indian to prove the negative that approval had never been given. However, the issue here is how a river moved, an issue which has nothing to do with one's status as an Indian. Because the presumption of title is not substantially related to the peculiar status of Indians, the only purposes section 194 serves here are to discriminate on the basis of race and to take property without compensation. This Congress cannot do.

The constitutionality of 25 U.S.C. § 194 as applied is a significant question of law, appropriately determined by this Court. The courts below recognized that the application of 25 U.S.C. § 194 is outcome-determinative in this case. The Tribe won 1900 acres from private defendants solely because of the shift in the burden of proof created by this statute. The Tribe could prevail against the State

only if it could bootstrap its victory using section 194 to avoid proving the avulsions on which its case depends.

If this Court considers the Tribe's arguments that its victory on the trust lands using section 194 has preclusive effect against the State, the State should be given the opportunity to argue that the result would be unconstitutional.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF 25 U.S.C. § 194 TO THE ISSUES IN THIS CASE CONSTITUTES INVIDIOUS RACIAL DISCRIMINATION, CREATES AN IRRATIONAL PRESUMPTION OF OWNERSHIP, TAKES PROPERTY WITHOUT JUST COMPENSATION, AND IS BEYOND THE POWER OF CONGRESS.

If the Tribe's arguments in its petition were adopted, the result would be that 25 U.S.C. § 194 would be used to determine those issues of fact common to both the State and its co-defendants – namely whether the riparian lands were cut off from the reservation by avulsion. This is contrary to the statute and to this Court's decision in *Wilson*, and it is also unconstitutional.

The presumption of ownership in any Indian once in possession of land is clearly discrimination on the basis of race. Unlike the statute upheld in *Morton v. Mancari*, 417 U.S. 535 (1974), 25 U.S.C. § 194 creates a racial classification which benefits all Indians and not merely those Indians enrolled in federally recognized tribes. The statute in *Morton* provided a preference in Bureau of Indian Affairs employment to enrolled tribal members. It was

specifically found not to create a racial classification. 417 U.S. at 553 (text and note 24). *Morton* is not authority that Indians may constitutionally be granted benefits on the basis of race. *University of California Regents v. Bakke*, 438 U.S. 265, 304, n.42 (1978).

Discrimination on the basis of race is inherently suspect and subject to strict judicial scrutiny. A racial classification may be upheld only if its purpose is constitutionally permissible, the classification is necessary to accomplish a compelling interest, and the means are narrowly tailored to accomplish that purpose. *City of Richmond v. Croson*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854, 881-82 (1989); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

Section 194 was adopted as an amendment to acts regulating intercourse between Indian tribes and non-Indians. *Wilson* (Pet. App. p. 119a). Act of May 6, 1822, 3 Stat. 683; Act of June 30, 1834, 4 Stat. 729, § 22. The Nonintercourse Act, 25 U.S.C. § 177, requires federal approval for the sale or transfer of Indian lands. If 25 U.S.C. § 194 were limited to issues of compliance with the Nonintercourse Act, then proof of trust status at the time of conveyance might arguably create a rational presumption that a deed was void, a presumption which a defendant could rebut by proving the existence of a treaty or other federal approval. By extending the presumption of title to any and all real property issues, 25 U.S.C. § 194 is not rationally tied to fulfillment of Congress's obligation to Indians, as required by *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Applying section 194 to create a presumption of avulsion from proof of possession of the land prior to river movements occurring 100 years and 60 years ago violates due process. There is no rational connection between possession prior to the river's movements and a party's status as an Indian, which are the facts proved, and the conclusion that the river moved by avulsion, the fact to be presumed. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). *See also Mullins Coal Co. v. Director, Office of Workers Compensation Programs*, 484 U.S. 135, ___ n.32 (1987). The Missouri River does not discriminate against Indians. No one can rationally presume that a river always moved into reservation land by avulsion. Indeed, the law recognizes that accretion is the rule and avulsion is a very uncommon case. *Nebraska v. Iowa*, 143 U.S. 359, 365-366 (1892). The application of section 194 to create a presumption of avulsion is not rationally related to its ostensible purpose – to protect Indians from unfair advantage. *Wilson* (Pet. App. pp. 119a-120a).

Imposition of this burden of persuasion is especially onerous when added to other special benefits the Tribe has in litigation. This suit was brought long after the expiration of statutes of limitation. The presumption of ownership provides the greatest advantage where, as here, the Tribe waits to pursue a claim until all evidence is difficult to obtain. The financial support of the federal government also gives a tribal plaintiff great advantage.

A tribe is not subjected to the same possibility of loss and gain from river movements as are other riparian owners. Yet this mutuality of risk is the basis of the law of river boundaries. *Nebraska v. Iowa*, 143 U.S. at 360-361, quoting *New Orleans v. United States*, 35 U.S. (10 Pet.) 662,

717 (1836); *see Wilson* (Pet. App. p. 127a). There is no evidence in the record to establish that the movements of the Missouri River along the boundary of the Omaha reservation only resulted in a loss of land to the Tribe. But given the applicability of statutes of limitation and sovereign immunity to bar claims by those who lost land by eastward movements of the river, there is clearly great potential for this Tribe and others to add significant acreage to their reservations. Section 194 exacerbates this inequity by creating a presumption of avulsion (or accretion) whenever a tribe so desires.

Permitting the United States to obtain title to real property by virtue of an unreasonable presumption constitutes an unconstitutional taking of property. The shift in the burden of persuasion resulting from 25 U.S.C. § 194 has, wherever applied in this case, resulted in the United States obtaining title to the property – title which it would not otherwise have obtained. *See Omaha III* (Pet. App. p. 103a). This statute where applied in this case operates as a permanent taking of title to the land by the United States. Because the presumption of title is not substantially related to the peculiar status of Indians, the only purpose section 194 serves here is to take property without compensation. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Congress cannot deprive a State of its property without payment of compensation. *Block v. North Dakota*, 461 U.S. 273, 291 (1983). A court cannot therefore constitutionally apply 25 U.S.C. § 194 where to do so would constitute a taking of the State's property.

Because the presumption of title lacks a rational basis, its only purpose in this case can be to transfer

property to the United States and to discriminate on the basis of race. Such are constitutionally impermissible objectives.

Furthermore, here the Tribe seeks to use section 194 to conclusively determine issues of fact as to land claims outside the scope of the statute – claims against the State and claims to land which were admittedly conveyed out of trust. The Tribe also seeks to bootstrap its victory as to the trust lands using section 194 as conclusively proving its claim of ownership of the lands outside the Barrett Survey merely by proof of accretion to the Survey lands. Extension of the effect of the presumption to claims outside the scope of the statute clearly has no rational basis.

II. IF THIS COURT GRANTS THE TRIBE'S PETITION, THE STATE SHOULD BE PERMITTED TO ARGUE THAT FINDINGS BASED ON 25 U.S.C. § 194 CANNOT CONSTITUTIONALLY BE APPLIED TO THE STATE.

The State has not to date been adversely affected by operation of 25 U.S.C. § 194, as this Court held that section does not apply to the State of Iowa, *Wilson* (Pet. App. pp. 121a-122a, 132a), and the State prevailed below. However, several of the questions presented in the Tribe's Petition for a Writ of Certiorari seek to have this Court quiet title in the Tribe to all of the lands it claims in Blackbird Bend, including State lands within and without the Barrett Survey. (Pet. pp. 24-26). The Tribe asserts that its victory in *Omaha II* (Add. p. A-1), based on section 194, establishes that the river moved west by avulsion and entitles the Tribe to all of the lands it claims within Blackbird Bend.

In *Omaha I* (Pet. App. p. 151a), the Court of Appeals summarily dismissed constitutional objections to section 194, citing *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974), as indicating that Congress can grant special treatment to Indians because of their special legal status. That decision was vacated on appeal. *Wilson* (Pet. App. p. 107a). The decision below, *Omaha IV* (Pet. App. p. 47a), states that *Omaha I* establishes the law of the case on the constitutionality of section 194. That is incorrect. Further, the State, which has so far prevailed in this litigation, cannot be precluded from challenging the constitutionality of the statute.

CONCLUSION

Cross-Petitioners State of Iowa and Iowa Department of Natural Resources pray that this Court grant this Cross-Petition if it grants the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH
Deputy Attorney General

JOHN P. SARCONE
Assistant Attorney General

Attorneys for State of Iowa and Iowa Department of Natural Resources

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1426, 88-1592 and 88-1636

In the Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON ET AL.

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
ROBERT L. KLARQUIST
MARTIN W. MATZEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's interests in this litigation.

2. Whether the instant litigation should have adjudicated those parts of the Tribe's claims that have been severed for future consideration.

3. Whether the district court violated Fed. R. Civ. P. 52(a) when it concluded that it was unnecessary, on the third remand of this complex litigation, to reiterate the factual findings set forth in earlier opinions.

4. Whether the burden-of-proof provisions of 25 U.S.C. 194 were correctly applied to the facts of this case.

5. Whether the escrowed net profits from the farming operations on the lands at issue were available to defray the payments to the defendants for the improvements they had made to those lands, as to which title has been quieted in the United States for the beneficial interest of the Tribe.

6. Whether the burden-of-proof provisions of 25 U.S.C. 194 subject the petitioners in No. 88-1592 to invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

7. Whether a decision to apply 25 U.S.C. 194 to the claims of the State of Iowa would deprive that State of its constitutional rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Block v. *North Dakota*, 461 U.S. 273 (1983)	14
City of Richmond v. *Croson*, 109 S. Ct. 706 (1989)	15
City of Rome v. *United States*, 446 U.S. 156 (1980)	15
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	15
Georgia v. *United States*, 411 U.S. 526 (1973)	15
Lavine v. *Milne*, 424 U.S. 577 (1976)	13
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	11
Morton v. *Mancari*, 417 U.S. 535 (1974)	14, 15
United States v. *Antelope*, 430 U.S. 641 (1977)	14
U.S. Department of Agriculture v. *Murry*, 413 U.S. 508 (1973)	14
Vlandis v. *Kline*, 412 U.S. 441 (1973)	14

Constitution, statute and rules:

U.S. Const. Amend. V	7, 12, 14
Takings Clause	14
25 U.S.C. 194	4, 10, 11, 12, 13, 14, 15, 16
Fed. R. Civ. P.:	
Rule 11	8
Rule 52(a)	9, 10
Sup. Ct. R.:	
Rule 19.5	11
Rule 20.5	11

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1426

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON, ET AL.

No. 88-1592

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

No. 88-1636

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The latest opinion of the court of appeals (Pet. App. 37a-48a)[1] is reported at 854 F.2d 1089. The latest opinion of the district court (Pet. App. 5a-15a) is reported at 578

[1] "Pet. App." refers to the Appendix to the petition in No. 88-1426.

F. Supp. 1191. The final judgment of the district court (Pet. App. 16a-30a) is unreported; the modification thereof (Pet. App. 31a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988, and a petition for rehearing was denied on November 10, 1988 (Pet. App. 49a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 28, 1989. The petition, No. 88-1426, was filed on that date and received by both cross-petitioners on March 3, 1989 (88-1592 Pet. 2; 88-1636 Pet. 3). Pursuant to Sup. Ct. R. 19.5, the cross-petition in No. 88-1592 was filed on March 30, 1989, and the cross-petition in No. 88-1636 was filed on Monday, April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation is a dispute over title to land within the original boundaries of the Omaha Indian Reservation created by treaty in 1854 along the west bank of the Missouri River in what was then Nebraska Territory. The River has changed course numerous times since 1854. In 1867, when the portion of the Reservation boundary at issue was surveyed by T. H. Barrett (the Barrett Survey), the River made a sharp oxbow curve creating a peninsula attached to the west or Nebraska side of the River.[2] The approximately 2,900-acre peninsula, which has since been cut off from the Nebraska side by the River and now lies

[2] The district court described the oxbow early in this litigation as "a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa" (Pet. App. 207a). Maps of the area at various times appear at Pet. App. 58a-65a.

on the eastern or Iowa side, is referred to in this litigation as the Barrett Survey Area.

In 1975, the United States brought suit as trustee for the Omaha Tribe to quiet the government's title to the lands within the Barrett Survey Area, with the exception of about 400 acres that had been allotted to individual Indians and subsequently sold to non-Indians (the fee-patented lands). Pet. App. 95a, 100a, 263a.[3] The Tribe subsequently filed two suits in its own right, claiming title not only to the fee-patented lands, but also to a larger 6,390-acre area known as Blackbird Bend, which encompasses the Barrett Survey Area, and to about 5,000 acres within two additional bends upstream (Pet. App. 253a, 269a). The three suits were consolidated and the Tribe's claims to lands outside the Barrett Survey Area and for damages were severed. The district court entered judgment against the Tribe and the United States in 1977 with respect to the common claims for the Barrett Survey Area (Pet. App. 252a). The court of appeals reversed (Pet. App. 135a), and this litigation came before this Court for the first time in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979); the Court there vacated the court of appeals' judgment and remanded the case for further proceedings. Over the last decade, the subsequent proceedings in both courts below have again culminated in a final judgment, which the Tribe[4] now asks this Court to review.

The fundamental factual issue in this litigation is whether the Missouri River moved by avulsion or by ero-

---

[3] In preparing answers to interrogatories, the United States discovered an additional 300 acres that had been allotted and sold.

[4] For the sake of simplicity, petitioners in No. 88-1426 will be referred to as the Tribe, conditional cross-petitioners in No. 88-1592 will be referred to as individual defendants, and conditional cross-petitioners in No. 88-1636 will be referred to as the State.

sion and accretion subsequent to the Barrett Survey.[5] The Tribe's claims of title rest on the contention that the River moved by avulsion prior to 1923, and thereafter by erosion and accretion along the western edge of the survey area. The fundamental legal issue involves the interpretation and the scope of 25 U.S.C. 194.[6] This Court in *Wilson* concluded that Section 194 applies to disputes with Indian tribes, and that it shifts the burden of persuasion, as well as the burden of coming forward with evidence, to the non-Indian party once the Indian party establishes a prima facie case, but that Section 194 does not apply to a State. 442 U.S. at 664-669.[7]

Applying the interpretation of Section 194 adopted by this Court in *Wilson*, the court of appeals on remand ordered title to approximately 1,900 of the 2,900 acres in the Barrett Survey Area quieted in the United States on

---

[5] As the Court explained in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660 n.7 (citations omitted):

> Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel.

[6] That Section provides that:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

[7] The Court also concluded that, although federal law governs the definition of what types of river movement constitute avulsion rather than erosion, state law should be adopted as the federal rule of decision. 442 U.S. at 671-676.

behalf of the Tribe; it remanded to the district court for further proceedings with respect to the fee-patented lands and certain lands in the western part of the Barrett Survey Area claimed by the State of Iowa. *Omaha Indian Tribe* v. *Wilson,* 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980). On remand, the district court found that the Tribe had proved by a clear preponderance of the evidence that neither the State nor the individual defendants had a valid claim to the disputed land, and quieted the title to the entire Barrett Survey Area in the United States as trustee for the Tribe. *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981) (Pet. App. 76a-84a).[8] The district court also denied the individual defendants' counterclaim for the value of their improvements to the lands, holding that the sovereign immunity of the United States barred the counterclaim (Pet. App. 84a-89a).

On appeal, the court of appeals reversed, holding that the district court had improperly given the Tribe the benefit of 25 U.S.C. 194 in adjudicating the claims to the lands held by the State and to the fee-patented lands. *United States* v. *Wilson,* 707 F.2d 304 (8th Cir. 1982), certs. denied, 465 U.S. 1025 and 1101 (1984) (Pet. App. 94a-103a). The court of appeals also ruled that the United States could be held liable for the value of improvements, holding that the equitable duty to pay for the improvements "is an element of the government's own claim, a condition precedent to the right of the United States to recover" and that the doctrine of sovereign immunity was therefore "inapplicable" (Pet. App. 106a). This Court

---

[8] The district court concluded that the court of appeals' opinion established the Tribe's ownership of all the Barrett Survey Area land (including the fee-patented lands) except that claimed by the State along the western edge of the area, and since the river had moved by accretion, not avulsion, the Tribe owned that land as well. Pet. App. 74a-77a & n.15.

denied the United States' petition for certiorari on that issue, 465 U.S. 1025 (1984).

Once again on remand, the district court issued its most recent opinion, holding that, without benefit of the Section 194 presumption, the Tribe had failed to prove that the river movements between 1879 and 1923 were avulsive and thus had failed to prove its claims to either the fee-patented lands or to the land held by the State, and that the individual and state defendants had met their burden of proving that title to these lands should be quieted in them. *United States* v. *Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984) (Pet. App. 8a-15a). The final judgment, dated May 29, 1987 (Pet. App. 16a-30a), quieted title to the 1,900 acres of the eastern Barrett Survey Area in the United States in trust for the Tribe and quieted title in the remaining 1,000 acres of fee-patented land and land held by Iowa in the individual defendants and the State, respectively. The judgment also obligated the United States to pay the individual defendants for the stipulated value of the improvements, totalling more than $1.9 million plus prejudgment interest (Pet. App 22a), and permitted the United States to use the escrow fund held in the registry of the district court "to partially satisfy its obligation to pay for improvements" (Pet. App. 30a).[9] On the Tribe's motion, the district court subsequently amended its order and denied the United States the right of reimbursement from the escrow fund (Pet. App. 33a-36a).

[9] The escrow fund had been created pursuant to the district court's order of June 5, 1975, the preliminary injunction which put the Tribe in possession of the lands. In order to reduce the "probability of financial injury to the defendants," the court required the Tribe to deposit the net profits from the 1975 farming operations on these lands with the clerk of court pending final disposition of this quiet title action (Pet. App. 259a, 262a). The profits from subsequent years were also deposited (Pet. App. 34a-35a).

In the latest round of appeals, the Eighth Circuit affirmed the judgment quieting title to the remaining 1,000 acres in the Barrett Survey Area in Iowa and the individual defendants, rejecting the Tribe's claims that the district court erred first, in finding that the Tribe had not met its burden of proof and second, in failing to set forth its factual findings in sufficient detail (Pet. App. 40a-44a). The court of appeals upheld the government's claim on its appeal that the district court should have allowed the profits from the escrow fund to be used to pay for the improvements (Pet. App. 44a-45a), but it rejected the government's challenge to the award of prejudgment interest on the value of the improvements, holding that the award of interest was no more a breach of the government's sovereign immunity than the equitable requirement that the United States pay for the improvements (Pet. App. 45a-47a). Finally, the court of appeals rejected the argument of the individual defendants that, because 25 U.S.C. 194 placed the burden of proof upon them as white citizens, it amounted to invidious racial discrimination and violated Fifth Amendment due process (Pet. App. 47a).

ARGUMENT

1. None of the questions presented in the petition for certiorari in No. 88-1426 merits review by this Court. On these questions, the decision of the court of appeals is correct and does not conflict with any decision of this Court (including the earlier decision in *Wilson* v. *Omaha Indian Tribe, supra*), or of any other court of appeals.

a. Petitioner Tribe alleges that two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's real interests in this litigation, and, as a result, the government's claims on behalf of the Tribe

were "intentionally constricted" (88-1426 Pet. 4-5, 18-22). The United States has responded to these charges in both the district court and the court of appeals, demonstrating that the government's filing of the complaint that initated this action was properly authorized in accordance with established procedures. See, *e.g.*, Pet. App. 329a-336a, 450a-460a. The district court found that the Tribe's contentions of impropriety were entirely without factual or legal basis. Indeed, after concluding that the Tribe's motion for summary judgment based on those contentions was "so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted", the court awarded sanctions against petitioner Tribe's counsel under Fed. R. Civ. P. 11 for frivolous pleadings (Pet. App. 365a-366a).[10] The court of appeals subsequently denied the Tribe's petition for relief based on these allegations as "frivolous and totally without merit"; that court also awarded sanctions against the Tribe's counsel for filing "a totally frivolous pleading" (*id.* at 461a). In the latest appeal, the Eighth Circuit refused to "entertain this meritless issue" again (*id.* at 40a n.4).

It is entirely clear that this issue does not warrant this Court's attention. The Tribe—represented by counsel of its choice—has participated fully in litigating title to the lands within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[11]

---

[10] The same counsel continues to represent the Tribe in this Court.

[11] In the previously severed portion of the suit (see p. 3, *supra*), the district court found on March 24, 1989, that the Tribe and its counsel have not complied with several earlier orders in the instant portion of the suit—including orders requiring the payment to the individual defendants, the State, and the United States of specified costs as sanc-

b. Petitioner Tribe also appears to argue that the judgment below should have encompassed all the lands claimed by the Tribe, including those located outside the Barrett Survey Area (88-1426 Pet. 23-26). However, as the court of appeals correctly noted (Pet. App. 44a n.5), the scope of the present litigation was long ago limited to settling title to the lands within the Barrett Survey Area, leaving the Tribe's larger claims for later adjudication. See *Wilson* v. *Omaha Indian Tribe,* 442 U.S. at 660. The Tribe's remaining claims are yet to be litigated. The effect, if any, of the present judgment upon those claims remains for consideration in the context of that litigation (cf. Pet. App. 48a), and is accordingly not ripe for determination by this Court.

c. Petitioner Tribe also contends that the court of appeals failed to enforce the requirement of Fed. R. Civ. P. 52(a) that a district court must adequately set forth its findings (88-1426 Pet. 25-26). The district court's final opinion declared that "[n]othing is gained by recataloguing the evidence here" (Pet. App. 8a). The court of appeals stated that the adequacy of the findings "must be viewed against the extensive prior scrutiny of the evidence in this case not only by the district court on two occasions, but also by this court on three separate occasions and by the United States Supreme Court" (*id.* at 43a). The court of

---

tions for frivolous filings, and orders imposing fines for contemptuous conduct. On the basis of these findings, the district court entered an order dismissing the Tribe's remaining claims with prejudice "unless the Tribe and Mr. Veeder fully comply with all orders as set forth herein, or show cause why they should not be required to do so by not later than April 10, 1989." Dist. Ct. Order 11. Petitioner Tribe's counsel submitted a check to the district court in payment of the amounts assessed, and asked the court to escrow the funds in its registry pending this Court's action on the instant petition for certiorari. On April 24, 1989, the district court denied the escrow request and directed the clerk to distribute the funds to the parties entitled to them under its previous orders.

appeals found (*id.* at 43a-44a) that the district court's reference to the prior decisions in this case "for a full statement of the extensive evidence" was sufficient to satisfy Rule 52(a). Nothing in this entirely routine conclusion warrants this Court's attention.

d. Petitioner Tribe challenges the application of 25 U.S.C. 194 to the factual context established in this litigation (88-1426 Pet. 25-26). The judgment below quiets the Tribe's beneficial title to all the trust lands which were in the possession of the individual, non-Indian defendants, while quieting title in those defendants only to those fee-patented lands to which the court found they held record title. The State, to which 25 U.S.C. 194 does not apply, prevailed in quieting its title to the lands for which the court found it held record title. See Pet. App. 12a-14a. There is no inconsistency on this record with this Court's decision in *Wilson* v. *Omaha Indian Tribe, supra.* In any event, this highly fact-specific claim does not warrant further review by this Court.

e. Finally, petitioner Tribe urges (88-1426 Pet. 26-28) that the court of appeals erred in permitting the funds escrowed in the district court registry to be used to defray part of the cost of improvements which the United States is obliged to pay under the judgment. The Tribe does not question that the individual defendants who occupied trust land are entitled to recover the value of the improvements from the United States. With that premise accepted,[12] the

---

[12] Earlier in this litigation, the United States petitioned this Court for review of the court of appeals' holding (Pet. App. 106a) that the government could be held liable to pay for the value of the improvements, urging that sovereign immunity barred any such claim in a quiet title action in which the government sought only title, not damages or mesne profits. The petition was denied, 465 U.S. 1025 (1984). In the latest appeal, the Eighth Circuit used the same reasoning to hold the government liable to pay prejudgment interest on the value

holding of the court of appeals is clearly correct and consistent with the general trust law that a trustee is ordinarily entitled to reimbursement from the trust estate for expenses incurred for the benefit of the trust beneficiary (see Pet. App. 44a-45a). In this case, as the court of appeals found (*id.* at 45a), the Tribe "has obtained the substantial benefit of having the land within the Barrett Survey cleared, drained, and otherwise improved through the efforts of the non-Indian defendants." Title to the improved lands has been quieted to the Tribe's beneficial interest. Accordingly, the judgment properly allows the escrow fund to be used to reimburse the United States for its payment of the value of those improvements.[13]

2. Conditional cross-petitioners in No. 88-1592 and No. 88-1636 challenge the constitutionality of 25 U.S.C. 194. Because these petitions would be jurisdictionally out of time except for the provision of Rule 19.5 of the Rules of this Court, the issues presented therein are properly before this Court only if it grants the petition in No. 88-1426, on which they depend. See Sup. Ct. R. 20.5. The constitutional issues presented by cross-petitioners are, in any event, without merit.

---

of the improvements, compounding its initial error in breaching the United States' sovereign immunity. See *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

Since the Court has once denied review of the improvements issue in this case and the Tribe's petition does not question the individual defendants' right to be paid for their improvements, the government has concluded not to seek review of the improvements or prejudgment interest issues in this case—though these issues may well warrant this Court's attention if they should arise in another quiet title action by the United States.

[13] Indeed, the improvements made the land suitable for farming, and the escrow fund consists of the net proceeds from farming.

a. Conditional cross-petitioners in No. 88-1592, individual defendants who occupied Barrett Survey Area lands,[14] contend that 25 U.S.C. 194 unconstitutionally placed the burden in this litigation upon them as "white person[s]" to prove their title to the trust lands. They argue that this statute constitutes invidious racial discrimination favoring Indians and Indian tribes and deprives them of due process in violation of the Fifth Amendment. As cross-petitioners frankly acknowledge (88-1592 Pet. 4), this identical issue is one the Court declined to accept when it granted certiorari in *Wilson* v. *Omaha Indian Tribe, supra.* Instead, without finding it necessary to give separate consideration to that issue and without expressing any doubts as to Section 194's constitutionality, the Court held that it applies to these cross-petitioners (442 U.S. at 653). *Wilson* thus demonstrates that cross-petitioners' constitutional objections to Section 194 are insubstantial and do not warrant this Court's plenary consideration.

As the Court found in *Wilson*, Section 194 was enacted to address the serious problem of "recurring trespass upon and illegal occupancy of Indian territory," and "to protect the rights of Indians to their properties." 442 U.S. at 664. The Court's opinion leaves no room for doubt that "the purpose of th[is] provision—that of preventing and providing remedies against non-Indian squatters on Indian lands," *id.* at 667—is a legitimate end, or that Section 194 represents a rational and appropriate means of securing that end.[15] Indeed, the result in this case confirms that

---

[14] The individual defendants occupied both Indian trust lands and fee-patented lands in the Barrett Survey Area.

[15] The State's argument notwithstanding (88-1636 Pet. 12-13), there is a plain and rational connection between the undisputed former status of this area as part of the Omaha Reservation and the statutory presumption that it remains so today. Section 194 "is triggered" only

Section 194 in fact serves to fulfill the federal government's special obligation to Indians and does not produce "invidious" consequences.

The individual cross-petitioners acknowledge (88-1426 Wilson et al. Br. in Opp. 4) that the Barrett Survey Area (within which the trust lands they claim are located) "was indisputably part of the Tribe's reservation in the 1860s." Their claim is that "the movements of the Missouri River * * * *destroyed the status of the land as reservation land*" (*ibid.* (emphasis added)). Cross-petitioners lost below simply because they could not prove by a preponderance of the evidence that this was so. Section 194 merely imposed upon them the burden to prove their contention that the reservation status of these lands had been "destroyed"—the same burden they would have had to shoulder if they had sued as plaintiffs for this land.[16] This

---

after "the Tribe makes out a prima facie case of prior possession or title," *Wilson,* 442 U.S. at 668, and operates only to establish a rebuttable "presumption of [Indian] title," 25 U.S.C. 194. Thus, Indians remain as subject to "loss or gain from river movements as are other riparian owners" (88-1636 Pet. 13), even though Section 194 requires non-Indians who claim lands formerly in Indian ownership or possession to carry the burden of proof—and risk of non-persuasion—on the issue whether river movements have divested the Indians of ownership.

[16] Individual cross-petitioners assume that their status as defendants in this civil action entitles them as a matter of constitutional right to have the burden of proof placed upon the plaintiffs. It is highly doubtful that cross-petitioners have a constitutional right to any particular allocation of that burden. See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.").

Cross-petitioners do not contend that anything in 25 U.S.C. 194, or in the conduct of the lengthy proceedings below, deprived them of the opportunity to present fully any evidence to support their contention

result cannot be deemed unfair, much less an example of invidious discrimination.

Moreover, individual cross-petitioners' due process claim must be viewed in light of "the unique legal status of Indian tribes under federal law and [of] the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). So viewed, Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" is to be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 554-555.[17]

---

that the conceded former status of this area as part of the Omaha Indian Reservation had been destroyed by the movements of the Missouri River. Cf. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). Because there was no such deprivation, there is no merit to the State's argument (88-1636 Pet. 14-15) that Section 194 works a taking of property without the just compensation required by the Fifth Amendment. Section 194 does not interfere with the full adjudication of ownership disputes; it merely requires the non-Indian to shoulder the burden of proving his ownership by a preponderance of the evidence. Thus, contrary to the State's submission (88-1636 Pet. 14-15), Section 194 does not "transfer property" to the United States in violation of the Takings Clause. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (rejecting claim that the Quiet Title Act's statute of limitations works a compensable "taking"). Unlike the time bar in *Block*, Section 194 permits, rather than prevents, judicial determinations of title based upon all probative evidence of title. To quiet title once all the evidence is considered is not, of course, to "transfer" title but to resolve the parties' ownership dispute.

[17] The Court reaffirmed this analysis in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such,

In order to safeguard a vital tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Thus, Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligations to the Indians by protecting their most valuable property—their lands.[18] In an analogous context, this Court has approved a congressional reallocation of the burden of proof in a fashion designed to serve important federal policies. *Georgia* v. *United States,* 411 U.S. 526, 538 n.9 (1973) (Voting Rights Act places burden upon covered states to prove that proposed electoral changes are not discriminatory in purpose or effect); *City of Rome* v. *United States,* 446 U.S. 156, 183 n.18 (1980) (same).

---

is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

The State cross-petitioners thus are incorrect in asserting (88-1636 Pet. 12) that because Section 194 singles out Indians for special treatment, it is "inherently suspect and subject to strict judicial scrutiny".

[18] Section 194 would therefore clearly pass muster not only under the test of *Morton* v. *Mancari, supra,* but also under the two-fold test of *Fullilove* v. *Klutznick,* 448 U.S. 448, 473 (1980), which individual cross-petitioners urge is applicable here (88-1592 Pet. 12-13). This test asks simply whether the objectives of the federal legislation are within Congress's power and whether the statute's limited use of a racial criterion is a permissible means to carry out that objective. See *City of Richmond* v. *Croson,* 109 S. Ct. 706, 717-718 (1989), discussing *Fullilove.* Here, Indians and Indian tribes are citizens for whom the United States holds lands in trust—a unique relationship—and Section 194 serves to carry out the government's trust obligations by pro-

b. The conditional cross-petition filed by the State of Iowa argues (88-1636 Pet. 9, 16) that, if the Tribe's petition is granted, this Court should also consider whether 25 U.S.C. 194 may constitutionally be applied to limit the rights of the State.

This Court has already held in this case that Section 194 does not apply with respect to the lands to which the State claims title (*Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 666-668, 678); the State seeks review of the constitutionality of the application of Section 194 to its claims only in the event that a grant of the Tribe's petition puts the State at risk that the Court will "effectively overrule" *Wilson* on this point (88-1636 Pet. 9). As we have demonstrated, the Tribe's petition presents nothing to suggest that it is appropriate for this Court to reconsider *Wilson*, so there is no occasion to consider the State's objections to an application of Section 194 this Court rejected at an earlier stage of this very case.

---

tecting Indian lands from the claims of non-Indians whose title cannot be established by a preponderance of the evidence. This Court's decision in *Wilson* leaves no room for doubt that Section 194 is a measure that Congress could constitutionally employ to that end, although it may be, as Justice Blackmun observed in his concurrence in *Wilson* (442 U.S. at 680-681), that Section 194 should be construed to apply in all disputes between Indians and any non-Indian—not simply any "white person"—in order to avoid creating an "irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee."

CONCLUSION

The petition for a writ of certiorari in No. 88-1426 and the conditional cross-petitions in Nos. 88-1592 and 88-1636 should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
ROBERT L. KLARQUIST
MARTIN W. MATZEN
Attorneys

MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 - 241 093/00233

Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,
Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION HAROLD JACKSON; AND OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

THE OMAHA INDIAN TRIBE,
Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for Omaha Indian Tribe of Nebraska, Cross-Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

32 pp

QUESTIONS PRESENTED

Whether the Court shouldn't first consider the grave misconduct of Evan L. Hultman, United States Attorney—who forced his rejected, fraudulent representation upon Cross-Respondent Tribe, in *United States v. Wilson*, Cross-Petitioner Iowa having admitted that Evan L. Hultman, as Attorney General of the State of Iowa, had previously represented the State of Iowa in a quiet-title suit with Cross-Petitioners Lakin and R.G.P., Inc. (Peterson) involving the "same area" of the Blackbird Bend Meander Lobe—antecedent to considering the Constitutionality of 25 U.S.C. 194, as requested by Cross-Petitioner Iowa?

Whether the Court shouldn't first consider the grave misinterpretation by the Court of Appeals of the Court's decision in *Wilson v. Omaha*—in which the Court of Appeals denied Cross-Respondent Tribe's title to the "same area" of land now occupied by Cross-Petitioner State of Iowa, Tribe having proved its title to that "area" of land without the aid of 25 U.S.C. 194—antecedent to considering the Constitutionality of 25 U.S.C. 194, as requested by Cross-Petitioner Iowa?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS	4
STATUTORY PROVISIONS AND RULES INVOLVED	4
STATEMENT OF THE CASE	5
CROSS-PETITIONER IOWA IS SEEKING AN ADVISORY OPINION	6
CROSS-PETITIONER IOWA ADMITS BASIC CHARGES BY CROSS-RESPONDENT TRIBE AGAINST UNITED STATES ATTORNEY HULTMAN	13
Cross-Respondent Tribe Proved Its Title Without the Aid of 25 U.S.C. 194	13
COURT OF APPEALS EFFECTIVELY ABROGATED THE COURT'S *Wilson v. Omaha* DECISION	18
TRIAL ON THE MERITS PERTAINED TO 6390 ACRES—NOT CONSTRICTED BARRETT SURVEY LINE	21
Principles of *Res Judicata* Forclose Cross-Petitioner Iowa's Efforts To Force a New Trial of Issues Already Concluded	26
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Brandon v. Holt, 469 U.S. 464, 471 (1985)	24
Chicago and S. Airlines v. Waterman Steamboat Co., 333 U.S. 103, 113-114 (1988). 1.C. Warren, *The Supreme Court in United States History* (Boston: Rev. Ed. 1926), 108-111	7
Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652 (CA 8, 1968).	23
Fiske v. Buder, 125 F.2d 841, 849 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1922)	10
Omaha v. Wilson, 575 F.2d 620, 622, (CA 8, 1988)	*passim*
RE: *U.S. v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson*, 524 F.Supp. 874 (U.S.D.C.N.D. Iowa W.D. 1981)	*passim*
Shelley v. Union Oil Co., 203 F.2d 808 (CA 9, 1956)	23
United States v. Wilson, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977)	*passim*
United States v. Wilson, 433 F.Supp. 67, 88 para. V. (U.S.D.C.W.D. 1977)	*passim*
United States v. Wilson, 707 F.2d 304, 309 (CA 8, 1982)	*passim*
United States v. Wilson, 578 F.Supp. 1191, 1193 (U.S.D.C.N.D. Iowa W.D. 1984)	*passim*
Vogrin v. Hedstrom, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955)	23
Wilson v. Omaha, 442 U.S. 653 (1979)	*passim*
Statutes	
25 U.S.C. 194	*passim*

Table of Authorities Continued

Page

Miscellaneous

Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R 15(b)," Sec. 15-13[1]. p. 15-119 23

Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45 24

Rule 15(b), Federal Rules of Civil Procedure 23

Restatement (Second) Judgment, para. 27, p. 250 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1636

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,
Cross-Petitioners,
JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; AND OTIS PETERSON,
(Cross-Petitioners on Separate Petitions)
v.

THE OMAHA INDIAN TRIBE,
Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Respondent Omaha Indian Tribe respectfully opposes the Cross-Petition filed by State of Iowa and Iowa Department of Natural Resources seeking to review the judgment of the United States Court of Appeals for the Eight Circuit.

OPINIONS BELOW[1]

The United States District Court for the Northern District of Iowa entered its Memorandum of Opinion

---

[1] Appendix A, *United States V. Wilson; Omaha v. Jackson, et*

on January 13, 1984, holding that Petitioner Omaha Indian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals of the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above

---

al.; Omaha v. Agriculture (hereafter referred to as Omaha v. Wilson) 578 F. Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984), p. 51.

[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. . . . Wilson*, 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in determining the grounds of the Final Judgment and the Opinions of the courts below.[6]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court

---

[6] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agriculture* . . . Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). On June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D. Iowa W.D. 1977).

to and including February 28, 1989.[7] The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

RULE 15(b), Federal Rules of Civil Procedure

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; but failure so to amend does not affect the result of the trial of these issues. If evidence is ob-

---

[7] *See,* Appendices D and E.

jected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

STATEMENT OF THE CASE

Reference is initially made to the fact that Cross-Petitioner Iowa repeatedly refers to the Addendum to its Brief in Opposition to Cross-Respondent Omaha Indian Tribe's Petition for a Writ of Certiorari. That Addendum is not the published opinion in the case of *Omaha Indian Tribe v. Wilson*, sometimes referred to as OMAHA II.[8]

For example, in the Addendum it is stated:

> Evidence of river movement in the critical periods too often gives no more than a basis for an 'educated guess,' in the words of Defendants' expert witness, Raymond L. Huber.[9]

In the official published decision reference is made to Dr. George R. Hallberg, rather than to Raymond L. Huber. How many other departures there are from the official published decision in Cross-Petitioner Iowa's Addendum is not clear. What is clear is that

---

[8] 614 F.2D 1153 (CA 8, 1980); *cert. den.* 449 U.S. 825 (1980).

[9] Cross-Petitioner Iowa's Brief in Opposition, Add. p.A.17.

the Addendum is not an official publication upon which the Court may rely.

CROSS-PETITIONER IOWA IS SEEKING AN ADVISORY OPINION

The Court, in its *Wilson v. Omaha* opinion declared that 25 U.S.C. 194 had no application to Cross-Petitioner Iowa, using this explicit language:

> . . . in terms of the purpose of the provision [25 U.S.C. 194]—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the State so as to offset the likelihood of unfair advantage. . . .
>
> We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 194 when litigating title to the property which it claims ownership. . . .[10]

That exemption from the application of 25 U.S.C. 194 for Cross Petitioner Iowa is not in any sense qualified—a fact admitted by Cross-Petitioner Iowa, which declares that:

> The State has not to date been adversely affected by operation of 25 U.S.C. § 194, as this Court held that section does not apply to the State of Iowa . . . and the State prevailed below.[11]

---

[10] Pet.App., Appendix H, p. 107a, 122a.

[11] Cross-Petition, p. 15.

Cross-Petitioner Iowa, admits that it has not as yet "been adversely affected by operation of 25 U.S.C. § 194" and engages in speculation as to what might happen under an unspecified, highly conjectural, and totally erroneous predicate. In simplest terms, Cross-Petitioner Iowa seeks from this Court an advisory opinion as to what might happen.

The refusal of the Court to render advisory opinions and the reasons for that Rule have been succinctly stated by the Court in these terms:

> This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties. . . .[12]

It is manifest beyond question that, in the present state of the record, Cross-Petitioner Iowa does not present either a case or a controversy under the Constitution respecting 25 U.S.C. 194 between itself and Cross-Respondent Tribe. Most assuredly there is no basis upon which the Court could grant a writ of certiorari. Both the Court and the Court of Appeals for the Eighth Circuit have carefully avoided applying 25 U.S.C. 194 to Cross-Petitioner Iowa.

It is to be noted, however, that Cross Petitioner Iowa refers to controversies between Cross-Respondent Tribe and the State of Iowa. Most assuredly those controversies do not involve 25 U.S.C.

---

[12] *Chicago & S. Airlines v. Waterman Steamship Co.*, 333 U.S. 103, 113-114 (1988). 1. C. Warren, *The Supreme Court in United States History* (Boston: Rev.Ed.1926), 108-111.

194. They stem from the gross misconduct of Evan L. Hultman, who forced his rejected representation upon the Tribe as United States attorney in *United States v. Wilson*[13] and fraudulently denied Cross-Respondent Tribe's title to the lands which he, Hultman, as former Attorney General of Cross-Petitioner Iowa, had obtained for Cross-Petitioner Iowa in a "previous settlement" among Cross-Petitioner Iowa and Respondents Lakin and R.G.P., Inc. (Raymond G. Peterson).[14]

Wholly apart from 25 U.S.C. 194, Cross-Respondent Tribe proved by a clear preponderance of evidence—found by the district court to be without the aid of 25 U.S.C. 194—that title resided in Cross-Respondent Tribe to the lands claimed by Cross-Petitioner Iowa.[15]

In the paragraphs which follow, consideration will be directed by Cross-Respondent Tribe to the ongoing controversies between Cross-Respondent Tribe and Cross-Petitioner Iowa.

It was not until the year 1965[16] that Cross-Petitioner Iowa had any claim to title within the Blackbird Bend Meander Lobe. In its injunctive order of June 5, 1975, the district court took cognizance of the fact that, although the Tribe had been forced out of possession for a great many years, the Tribe had never abandoned its claimed to the land. On the subject, the district court declared:

---

[13] Pet. p. 6-11.

[14] Opposition, p. 13.

[15] Pet. p. 9, *et seq.*; p. 14-15.

[16] Cross-Petition, p. 13.

> The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course.[17]

Moreover, when the district court denied the efforts of the Department of Justice to seize and take from the Tribe its "profits" from the farming operation, the district court rejected that effort, declaring:

> The Tribe will not be penalized for the government's failure for approximately 50 years to promptly seek quiet title to the trust lands.[18] [Reversed, Appen. C, p. 44a]

The record is replete with proof that Cross-Respondent Tribe at all times asserted its claim to title to the Blackbird Bend Meander Lobe. A reluctant or negligent trustee failed to protect the Tribe's property and, when the Tribe, acting through its own attorney, sought to recover the full 6390 acres of the Blackbird Bend Meander Lobe, Evan L. Hultman, United States Attorney, forced his representation upon the Tribe, fraudulently constricting the claim to 1900 acres.

Involved here is not only the source of Cross-Petitioner Iowa's title, but the fact that the title asserted by Cross-Petitioner Iowa is at the very best highly questionable and subject to divestiture if Cross-

---

[17] Pet.App., Appendix M, p. 256a, 260a.

[18] Pet.App., Appendix B, p. 16a, 35a.

Respondent Tribe is permitted to be heard respecting the forced, fraudulent representation by Evan L. Hultman, United States Attorney, as is requested in its Petition for a Writ of Certiorari.[19]

In view of the fact that Cross-Petitioner Iowa's title is predicated upon the fraud of its former Attorney General, Evan L. Hultman, it is wholly improper for Cross-Petitioner Iowa to lament the problems that it had encountered in offering proof respecting the ". . . possession of the land prior to river movements occurring 100 years and 60 years ago."[20] A cursory review of the record establishes that Cross-Petitioner Iowa did not undertake to prove the source of its title other than to refer to the Hultman quiet title actions in 1965 and the conformitory quitclaim deeds. More importantly, and subsequently discussed, the title of Cross-Petitioner Iowa stems directly from Mr. Hultman's "sell-out"[21] of Cross-Respondent Tribe in the case of *United States v. Wilson*, in which Mr. Hultman denied Cross-Respondent Tribe's title to the lands claimed by Mr. Hultman for Cross-Petitioner Iowa.[22]

In the trial on the merit, Cross-Petitioner Iowa offered no evidence respecting river movements, much less "movements occurring 100 years and 60 years ago." There is no basis for Cross-Petitioner Iowa's attack upon 25 U.S.C. 194 by declaring:

---

[19] Pet. p. i, initial question; p. 6-9.

[20] Cross Petition, p. 13.

[21] Pet. p. 18; *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942; *cert. den.* 273 U.S. 756 (1942).

[22] Pet., p. 7, *et seq.*

> There is no rational connection between possession prior to the river's movements and a party's status as an Indian and the conclusion that the river moved by avulsion, the fact to be presumed.[23]

Continuing without reason its attack against 25 U.S.C. 194, from which Cross-Petition Iowa has been expressly exempt, Iowa declares that "[t]he Missouri River does not discriminate against Indians"[24]—whatever that means. Most assuredly the record is devoid of any reason which would give rise to that unusual statement.

Cross-Petitioner Iowa has departed totally from the express language of 25 U.S.C. 194, the OMAHA I decision,[25] and the Court's *Wilson v. Omaha* decision.[26] Rather, Cross-Petitioner Iowa declares that:

> The application of Section 194 to create a presumption of avulsion is not rationally related to its ostensible purpose—to protect Indians from unfair advantage.[27]

Source of that total misconception that in some fashion 25 U.S.C. 194 created "a presumption of avulsion" is repeated in these terms:

> Section 194 exacerbates this inequity by creating a presumption of avulsion (or accretion) whenever a tribe so desires.[28]

---

[23] Cross-Petition, p. 13.

[24] Cross-Petition, p. 13.

[25] Pet.App., Appendix I, p. 135a, 147a-155a.

[26] Pet.App., Appendix H, p. 107a, 117a-123a.

[27] Cross Petition, p. 13.

[28] *Ibid.*, p. 14.

An examination of the legislative history, the judicial analyses in OMAHA I and the Court's *Wilson v. Omaha* decision, and the plain reading of 25 U.S.C 194 belies any basis for those two irrational conclusions. Those irresponsible statements as to the affect of 25 U.S.C. 194 presage these equally impermissible conclusions:

> Permitting the United States to obtain title to real property by virtue of an unreasonable presumption constitutes an unconscionable taking of property. . . . This statute where applied in this case operates as a permanent taking of title to the land by the United States.

Having declared that the national government was exceeding its powers, Cross-Petitioner Iowa then states that:

> Congress cannot deprive a state of its property without payment of compensation. A court cannot therefore constitutionally apply 25 U.S.C. § 194 where to do so would constitute a taking of the State's property.[29]

The Court's decision in *Wilson v. Omaha* shows the total misconception as expressed by Cross-Petitioner Iowa of the responsibilities of the National Government as Trustee for Cross-Respondent Tribe. There was reviewed in *Wilson v. Omaha* the objectives of 25 U.S.C. 194. It was for the express purpose of protecting ". . . Indians from claims made by non-Indian squatters on their lands.[30] Those who formu-

---

[29] *Ibid.*, p. 14.

[30] Pet.App., Appendix H, p. 107a, 119a-122a.

lated 25 U.S.C. 194 could not be expected to anticipate that an United States Attorney—here Even L. Hultman—would "sell out" an Indian Tribe for the benefit of his former client, "squatter" Cross-Petitioner Iowa.

CROSS-PETITIONER IOWA ADMITS BASIC CHARGES BY CROSS-RESPONDENT TRIBE AGAINST UNITED STATES ATTORNEY HULTMAN[31]

Cross-Respondent Tribe Proved Its Title Without the Aid of 25 U.S.C. 194

Cross-Respondent Omaha Indian Tribe, in its Petition for a Writ of Certiorari to the Court, stressed that the lands claimed by Cross-Petitioner Iowa within the Barrett Survey Line were the same lands which Evan L. Hultman, as Attorney General for Cross-Respondent Iowa, had obtained for the State of Iowa from from Cross-Petitioners Lakin and R.G.P., Inc. (Peterson). Cross-Petitioner Iowa has admitted that Evan L. Hultman, United States Attorney in *United States v. Wilson*, had as Attorney General represented Cross-Petitioner Iowa ". . . when the State settled a quiet-title suit between itself and private defendants [Cross-Petitioners Lakin and R.G.P., Inc., Peterson] *in this same area*"[32]—a most shocking violation of the Code of Professional Responsibility,[33] and not mentioned or in any sense explained by Cross-Petitioner Iowa.

---

[31] Cross-Petition, p. 5-9; *see*, Pet. p. 7, *et seq.*; p. 9, *et sea.*; p. 18, *et seq.*

[32] Cross-Petitioner Iowa's Brief in Opposition to Cross-Respondent Tribe's Petition for a Writ of Certiorari, p. 13; *see* Pet., p. 20. (Emphasis supplied)

[33] Pet., p. 20-21.

Cross-Petitioner Iowa then declares that the Tribe "... has not shown how the previous settlement" by Evan L. Hultman of the claims among Cross-Petitioners Iowa, Lakin and R.G.P., Inc. "affected the Tribe's claim in this case."[34] That statement is irresponsible in view of the unchallenged and fully documented statements "that Evan L. Hultman's sellout" of Cross-Respondent Tribe had resulted in (a) Cross-Respondent Tribe being deprived of title to 980 acres (originally 700 acres) of land *within* the Barrett Survey Line; and (b) Tribe's claim to 6390 acres of land was diminished by Evan L. Hultman to 1900 acres with the attendant abandonment by Evan L. Hultman of Tribe's valid claim to 3400 acres of land *outside* the Barrett Meander Line.[35]

In the trial on the merits, Cross-Respondent Tribe, without the aid of 25 U.S.C. 194, proved by a clear preponderance of the evidence that—in the words of the district court—"... the defendants [including Cross-Petitioner Iowa] have no right or claim to any land in the western Barrett Survey, including the lands occupying the area described by fee patents."[36] Specifically in regard to Cross-Petitioner Iowa, the district court found that the lands claimed by Cross-Petitioner Iowa "were washed away" and replaced by accretions to Cross-Respondent Tribe's trust lands.[37]

Quitclaim deeds from Cross-Petitioners Lakin and R.G.P., Inc. (Peterson) were offered in evidence in

---

[34] *Ibid.*

[35] Pet., p. 6-11; *see*, Plates I and II, p. 8, 10.

[36] Pet.App., Appendix F, p. 52a, 83a.

[37] *Ibid.*, p. 78, para. 3.

the trial on the merits in support of Cross-Petitioner Iowa's claim to title. Cross-Respondent Tribe established in the trial on the merits that Cross-Petitioner Iowa's grantors, Cross-Petitioners Lakin and R.G.P., Inc., had failed to prove their title. The district court declared that the quitclaim deeds from Cross-Petitioners Lakin and R.G.P., Inc. did not and could not transfer title to Cross-Petitioner Iowa, based upon these facts and law:

> The State's claim to western Barrett Survey lands based upon quitclaim deeds from other defendants also falls. A quitclaim is used by a grantor to convey only such interest as he has . . . .[U]nder a conveyance by a quitclaim deed the grantor had. If the grantor himself has no title or interest [as here] to the property conveyed, most courts hold that the grantee takes nothing under a quitclaim deed.[38]

It is of extreme importance here that the district court found with specificity that Cross-Respondent Tribe had proved its title against Cross-Petitioner Iowa without the aid of 25 U.S.C. 194. This is the language of the district court, which likewise exposes the grave misrepresentations contained in the Cross-Petition filed by the State of Iowa:

> Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds that Tribe established by a clear preponderance of the evidence its right and claim

---

[38] *Ibid.*, p. 78a, n. 6.

> to the land occupying the area described in the fee patents.[39]

In the record before the Court in *Wilson v. Omaha* there is set forth the evidence relied upon by the district court giving rise to its declaration that title to the accretions west of the trust land—the land claimed by Cross-Petitioner Iowa—resided in Cross-Respondent Tribe rather than Cross-Petitioner Iowa.[40] As found by the district court in *Blackbird Bend II* the "several hundred acres of land" referred to by the Court in *Wilson v. Omaha*[41] had been obliterated and replaced by accretions to Cross-Respondent Tribe's trust lands. The Court did not deny—indeed did not consider—whether Cross-Respondent Tribe could be deprived of its title to accretions to the trust lands which had totally replaced the obliterated fee-patented lands a half century prior to the denial of Cross-Respondent Tribe's title to those lands by Evan L. Hultman in *United States v. Wilson.*

Reference was specifically made by the district court to *Wilson v. Omaha* in which the Court commented upon the "avulsive-accretion riddle" involving disputes between ". . . Indians on one side" and non-Indians on the other. The Court then added:

> . . . in this case several hundred acres of land within the Barrett survey are held in fee, and conceivably are not Indian property.[42]

---

[39] *Ibid.*, p. 80, n. 19.

[40] Pet.App. Appendix F, p. 52a, 80a, para. 5.

[41] Pet.App., Appendix H, p. 107a, 128a.

[42] *Ibid.*

There was not presented in the phase of the litigation before the Court in *Wilson v. Omaha* the issue of title to the "... several hundred acres of land" to which the Court referred. By way of explanation as to why this issue of the "... several hundred acres of land within the Barrett survey are held in fee" was not before the Court stems from the fact that in *OMAHA I* the Court of Appeals had applied 25 U.S.C. 194 to Cross Petitioner Iowa and title to the several hundred acres of land occupied principally by Cross-Petitioner Iowa was awarded to Cross-Respondent Tribe by the Court of Appeals. It was not until the remand to the district court, exempting Cross Petitioner Iowa from the application of 25 U.S.C. 194, that the fatally defective title claimed by Cross-Petitioner Iowa was fully considered by the district court.

As reviewed above, the district court found that, without the aid of 25 U.S.C. 194, the Tribe had proved its title against Cross-Petitioner Iowa and quieted title against Cross-Petitioner Iowa.

From the district court's award to Cross-Respondent Tribe of the accretions to its trust lands which had replaced the "fee patented lands" excepted by Evan L. Hultman and denied title to Cross Petitioners Iowa, Iowa appealed the issue. It is most unfortunate that Cross-Petitioner Iowa departs so radically from the facts contained in the record when it makes this erroneous statement in its Cross-Petitioner:

> The Tribe's argument that *Omaha II* conclusively established its right to the State lands as accretions to the 'trust lands' had been

> adopted by the District Court on remand from *Omaha II. Blackbird Bend II* (Pet.Ap. pp. 56a-57a, 83a-84a).[43]

Cross-Petitioner Iowa simply departs from the fact when it asserts that Cross-Respondent Tribe relied upon "Omaha II" to establish its valid claim to title against Cross-Petitioner Iowa. As previously stated, it was OMAHA I that conclusively established that the "squatters" had failed to sustain their burden of proof.[44]

Moreover, Cross-Petitioner Iowa does not attempt to support the drastic departure in OMAHA III from the basic language and rationale of the Court in *Wilson v. Omaha.*[45]

COURT OF APPEALS EFFECTIVELY ABROGATED THE COURT'S *WILSON V. OMAHA* DECISION

The Court of Appeals in OMAHA III acknowledges the district court's findings and conclusions that the land claimed by Cross-Petitioner Iowa ". . . was completely washed away by the post-1923 western movement of the river" and reemphasized that fact by stating "it is undisputed that" the lands claimed by Cross-Petitioner Iowa are accretions to Cross-Respondent Tribe's trust lands but declared, nevertheless—relying on *Wilson v. Omaha*, it is believed in total error—that:

> We deem this fact not significant. It is the *area* of land now occupied by the landowners

---

[43] Cross-Petition, p. 7.

[44] Pet.App., Appendix I, p. 135a, 167a.

[45] Pet.App., Appendix H, p. 107a, 119a-123a.

> that is important. *See, Wilson v. Omaha Indian Tribe,* 442 U.S. at 668. . . .[46]

The magnitude of the conflict between the Court of Appeals' OMAHA III decision and *Wilson v. Omaha* is clearly defined. The Court in *Wilson v. Omaha* most assuredly did not declare that Cross-Petitioner Tribe could not succeed against Cross-Petitioner Iowa—as it did in fact—when it proved accretions to its "trust lands." For the Court of Appeals to declare that *Wilson v. Omaha* so held is in clear violation of the express language of the Court. By its opinion, the Court of Appeals has effectively abrogated the Court's opinion in *Wilson v. Omaha.* To interpret *Wilson v. Omaha* as awarding title to "the landowners" who were occupying the land at the time of the trial is clear violation of the Court's opinion. It is manifest that the Court of Appeals had great difficulty in rationalizing away Tribe's title to the accretions to Tribe's trust lands. To justify its denial of Tribe's proven title to the accretions to the trust lands, the Court of Appeals declared—in total error—that the only means pursuant to which title to those lands could be acquired by the Tribe under *Wilson v. Omaha* was by an avulsion over and across the Barrett Survey land.[47] As reviewed above, Cross Respondent Tribe proved its title to those lands as accretions to Tribe's trust lands which in no way involved an avulsion.[48]

---

[46] Pet.App., Appendix G, p. 92a, 99a-101a-103a. (Court's emphasis).

[47] Pet.App., Appendix G, p. 92a, 101a.

[48] *Supra,* p. 15.

Fully cognizant that the Tribe had been awarded title by the district court without reliance upon 25 U.S.C. 194, the Court of Appeals in OMAHA III, utilizing cryptic language, declared that Cross-Respondent Tribe would be denied title because it could not "bootstrap" 25 U.S.C. 194. Understandably Cross-Petitioner Iowa embraces the "bootstrap language"[49] without explaining the meaning of it and seeks to have the Court affirm the drastic departure of the Court of Appeals in OMAHA III, which rejects the undenied and undeniable proof that Cross-Petitioner Tribe has title vested in it—totally independent from 25 U.S.C. 194—all as explicitly reviewed above.

It is incredible that the Court of Appeals should thus construe 25 U.S.C. 194 as denigrating the quality of Cross-Respondent Tribe's title to the trust lands by denying Tribe the right to accretions to those trust lands. Accretions are an invaluable property right, one of the natural attributes of title. In Horn-Book Theory, the Court of Appeals, in grave error, has denied that the Tribe has title to one of the sticks in the bundle of rights constituting fee simple title.

In denying Tribe the accretions which are part and parcel of the trust lands and recognizing title in Cross-Petitioner Iowa to the nonexistent fee patent lands, the Court of Appeals violated the most elemental principles of real property law recognized, enunciated, and applied by the district court in these terms:

> In both Nebraska and Iowa, the effect of such a movement of the river is to destroy

---

[49] Cross Petition, p. 7, 11.

> the title to the land obliterated by the movement of the river. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Winkle v. Miters*, 195 Neb. 821, 241 N.W.2d 329 (1976); *Rupp v. Kirk*, 231 Iowa 1387, 4 N.W.2d 264 (1942); *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). This court cannot, therefore, apply state laws of adverse possession or laches based upon the former title to the lands in fee patent. Application of those laws if at all, must be based upon the present character of the title to the accretions.[50]

In petitioning the Court to reverse the "bootstrapping" concepts of the Court of Appeals, Cross-Respondent Tribe emphasizes to the court that Cross-Petitioner Tribe was intentionally victimized by Cross-Petitioner Iowa's former Attorney General who violated the most basic precepts of the Code of Professional Responsibilities in forcing his representation upon Cross-Respondent Tribe for the benefit of Cross-Petitioner Iowa.[51]

TRIAL ON THE MERITS PERTAINED TO 6390 ACRES—NOT CONSTRICTED BARRETT SURVEY LINE

Cross-Petitioner Iowa is totally in error in declaring that the "Barrett Survey area" has been tried and that ". . . the second portion of the suit has not yet been tried."[52] Cross-Petitioner Iowa seeks to avoid the fact that it answered and counterclaimed against Cross-Respondent Tribe's complaint in *Omaha v. Wil-*

---

[50] Pet.App., Appendix F, p. 52a., 81a.

[51] Pet., p. 7, *et seq.*, p. 20 and cited authorities.

[52] Cross-Petition, p. 5.

son in which Cross-Respondent Tribe claimed title to 6390 acres in the Blackbird Bend Meander Lobe.[53]

In that counterclaim, Cross-Petitioner Iowa did not limit its answer and counterclaim to the "Barrett Survey area"; rather Cross-Petitioner Iowa asserted in its answer and counterclaim that the land which may have been at one time within the ". . . geographical area of the Omaha Indian Reservation . . . which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff [Cross-Respondent Tribe] to said land was extinguished thereby."[54]

Though Cross-Petitioner Iowa, in the trial on the merits, could best be described as a by-stander—offering virtually no evidence on its own behalf other than seeking to establish Cross-Petitioner Iowa's claim to title based upon its "previous settlement" by Evan L. Hultman with Respondents Lakin and R.G.P., Inc.—it nevertheless, in error, vigorously attacks what it perceived to be Cross-Respondent Tribe's evidence offered in the trial on the merits.[55]

Cross-Petitioner Iowa would have the Court ignore the fact that the entire trial on the merits pertained to the full 6390 acres of land comprising the Blackbird Bend Meander Lobe rather than in conformity with the 1976 pretrial *sua sponte* Order[56] that purported

---

[53] Pet., p. 9, "Petitioner Tribe's Quiet Title Action, *Omaha v. Wilson.*"

[54] Pet.App., Appendix DD, p. 384a, 387a, para. 42.

[55] Cross-Petition, p. 6.

[56] Pet. App., Appendix GG, p. 403a, 405a, first para.

to limit the trial to the "Barrett Survey." Cross-Petitioner Iowa in seeking to limit the case to the lands within the "Barrett Survey," avoided reference to that fact, as reviewed above, that they pleaded and undertook to prove that the entire Blackbird Bend Meander Lobe comprising 6390 acres was washed away and replaced by accretions to the Iowa riparian land. It is the *record* in the case—the oral, documentary, and demonstrative evidence—to which the April 5, 1976 *sua sponte* pretrial order must conform—not the converse, as urged by Cross-Petitioner Iowa.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, that where, as here, the evidence offered by all parties is received into the record without objection, the parties are bound by the issues actually tried irrespective of the pretrial order.[57] The precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was nevertheless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[58]

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b).[59] In

---

[57] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968).

[58] *Shelley v. Union Oil Co.*, 203 F.2d 808 (CA 9, 1956); *see* also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert. den.* 350 U.S. 845 (1955).

[59] Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sec. 15-13[1]. p. 15-119, *et seq.*

addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al., v. Holt*[60] there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders.

The concepts enunciated above most surely have application to the *sua sponte* pretrial order which was totally ignored at the trial on the merits and which must be set aside to comport with the pleadings and proof in the record offered by all parties, Cross-Respondent Tribe and Petitioners alike, which proof related to the entire Blackbird Meander Lobe, and not to the constricted "Barrett Survey," as argued by Cross-Petitioner Iowa. The Court, in the *Brandon* decision, cites Rules 15(b) and the authorities which have applied that Rule which was designed " 'to avoid the tyranny of formalism.' " It has been authoritatively stated that the procedures provided for Rule 15(b):

> . . . are intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action [the *sua sponte* order] and later proved to be erroneous.[61]

---

[60] 469 U.S. 464, 471 (1985).

[61] Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

It is correct to say that Cross-Petitioner Iowa totally misconceived the main thrust of the decision upon which it is relying.[62] In that opinion, the Court of Appeals for the Eighth Circuit was *not* analyzing the evidence offered by Cross-Respondent Tribe. It was assessing the evidence offered by Cross-Petitioners predicated upon *Wilson v. Omaha*, declaring that the Tribe under 25 U.S.C. 194 did not have the burden of proof. Specific reference was made by the Court of Appeals to the unsuccessful efforts of Cross-Petitioner Iowa and the other Cross Petitioners to prove the impossible—that the Blackbird Bend Meander Lobe including the Barrett Survey land was accretions to the Iowa riparian bank.

Following the same erroneous course as the other Cross-Petitioners, it is asserted by Cross-Petitioner Iowa that "educated guesses" were part of Cross-Respondent Tribe's evidence. That implication is totally in error. It is unquestionably true that Cross-Petitioners' expert, Dr. Hallberg, admitted on cross-examination, that his expert opinions were "educated guesses."[63] In that regard reference is made to the fact that all of the Plates extensively utilized by both the district court and the Appellate Court were copies of Tribe's exhibits, admitted into evidence at the trial on the merits based upon the testimony of Tribe's well-qualified experts.[64]

---

[62] *Omaha v. Wilson*, 614 F.2d 1153 (CA 8, 1980); *cert. den.* 449 U.S. 825 (1980).

[63] Cross-Petition, p. 11, n. 14.

[64] Pet.App., Appendix 1, OMAHA I, p. 135a, 142a-144a; Appendix F, *Blackbird Bend II*, p. 52a, 58a-65a.

Principles of *Res Judicata* Forclose Cross-Petitioner Iowa's Efforts To Force a New Trial of Issues Already Concluded

Cross-Petitioner Iowa participated in all aspects of the trial on the merits, and is most assuredly bound by that participation, albeit as more of a spectator, in which Cross-Petitioners Lakin, Wilson, R.G.P. Inc., et al., vigorously attempted to prove that the Blackbird Bend Meander Lobe was accretions to the Iowa riparian land. Cross-Petitioner Iowa, moreover, counterclaimed against Cross-Respondent Tribe's claim to the full 6390 acres in the Blackbird Bend Meander Lobe, declaring among other things, that Cross-Respondent Tribe's title had been extinguished due to the fact that the Blackbird Bend Meander Lobe had been totally destroyed by Missouri River action.[65]

The issues were fully tried by all parties in the trial on the merits involving the lands outside the Barrett Meander Line extending throughout the entire Blackbird Bend Meander Lobe. All parties participated in that trial including Cross-Petitioner Iowa. The precepts respecting the applicability of *res judicata* have been fully reviewed[66] and are most surely applicable to Cross-Petitioner Iowa. It was stressed to the Court of Appeals that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the

---

[65] Pet.App., Appendix DD, p. 384a, 387a, para. 42

[66] See, Pet. p. 23 and authorities cited there.

parties, whether on the same or in a different claim.[67]

CONCLUSION

Cross-Respondent Omaha Indian Tribe urges the Court to deny Iowa's Cross-Petition for the reasons reviewed above.

Respectfully submitted,

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for
Omaha Indian Tribe

---

[67] Restatement (Second) Judgment, para. 27, p. 250.